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IN THE

Supreme Court of the United States

October Term, 1958.

No. 240.

LEON A. BRINKLEY, SR.,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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QUESTION PRESENTED.

Should this court grant certiorari to consider whether the trial court properly refused two of petitioner's requested instructions to the jury on the issue of negligence by a fellow employee when, in fact,

(a) the trial court fully covered the issue of negligence of fellow employees in its general instructions;

(b) the instructions refused were not supported by the evidence; and

(c) they were misleading and defectively phrased.

STATEMENT OF THE CASE.

Petitioner brought an action in the United States District Court for the Eastern District of Pennsylvania under the Federal Employers' Liability Act against the Pennsylvania Railroad Company on account of injuries sustained when he stepped backward off an electric truck and fell into the space between the station platform and the box car which he was unloading. The jury returned a verdict in favor of respondent.

Petitioner was employed as a trucker-loader at respondent's Butler Street Station in Philadelphia, Pennsylvania, as a member of a four-man gang which unloaded packaged freight from boxcars at the station platform. His job was to operate an electric truck (20a), known as a Chore Boy (Petitioner's Exhibits 1, 2, 3, 4, 154a-156a),[1] and to assist in unloading the packages (19a, 27a, 8b). He was an experienced Chore Boy operator (5b) and was quite familiar with the space between the station platform and the cars that have to be unloaded (14b, 15b).

Butler Street Station is one of respondent's newest freight stations which was designed with a special "safety feature," a space between the freight platform and cars that are parked there, wide enough to provide adequate clearance for car inspectors and other employees to work safely on the track level below the platform (55b, 56b, 49b). This feature is a part of the newer stations of the Pennsylvania and other railroads (56b). The space varies from thirty to thirty-six inches, depending upon the width of the cars that are being unloaded (37b-38b, 55b).

The space between the car and the platform was spanned by a steel-edged, wooden transfer plate (Petitioner's

1. Page references followed by the letter "a" are to Appendix of Appellant in the court below which omits practically all of defendant's cross-examination of plaintiff and most of defendant's evidence on liability. Page references followed by the letter "b" are to Appendix to Brief for Appellee which restores these significant omissions.

Exhibit 5, 158a) which petitioner's witness, Kirby,[2] testified was 48 inches wide (49a), but which the general foreman and the freight agent in charge of the station testified was 54 inches wide (38b, 44b, 57b). Petitioner claimed that there had been complaints about the width of the plates (36a, 54a), and he indicated that instead of the plates then in use, the railroad should have furnished steel transfer plates with a two-inch flange (29a) (Plaintiff's Exhibit 2, 155a). These all-steel plates were just one inch wider than the plates then in use (39b, 57b) and their edges were raised for the dual purpose of reinforcement and to prevent truck wheels from going over the edge (40b, 57b). The flange had nothing to do with keeping people from falling over the sides (40b, 58b). Neither General Foreman Whittaker, Freight Agent Clowes, nor Nicholas Tedeschi, another member of the gang, had ever heard any complaints about the width of the transfer plates (31b, 40b, 58b).

Petitioner backed the truck on the transfer plate (26a), although he admitted that he could have parked it on the station platform until a sufficiently large space was cleared within the car to drive the truck inside (25b, 27b). "Whenever possible," according to Brinkley, the unloading was done this latter way unless the freight was too heavy to be loaded by hand (27b, 28b).[3] The other members of the gang began to load the truck and when petitioner got into position on the transfer plate "alongside" the truck to help in the unloading, several packages were already on it, one of which was under the seat (27a). Since the truck was just three feet, four inches wide (16a), its center, where the seat was located, was only 20 inches from the side.

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2. Kirby was a union representative (69a) and a plaintiff in a suit against the railroad company for injuries sustained at Butler Street (58a).

3. Brinkley and Kirby claimed that Freight Agent Clowes was "driving" the men that morning and for that reason they parked the truck on the plate instead of the platform (35a, 36a, 55a, 57a, 24b). This testimony was contradicted by Trucker-Loader Tedeschi, General Foreman Whittaker and Freight Agent Clowes (32b, 42b, 60b).

At the trial petitioner told a story about the happening of the accident different from that which he told on deposition two years before (17b-21b). At the trial he testified that from his position on the transfer plate he reached forward to move the package under the seat and in manipulating it, because of its unexpected weight, lost his balance and fell backward into the space between the platform and the car (27a, 16b, 21b).

In his deposition two years before the trial petitioner had testified that he got up on the truck to move the packages about and after this was done, in stepping back to the transfer plate, he just stepped off into space (17b-21b). Confronted on cross-examination with four separate statements to this effect in his deposition, he repudiated them, claiming that he was in such pain he could not think clearly about his answers at that time (21b, 22b).[4]

Petitioner testified that the Chore Boy seat could have been equipped with a fence or guard to keep packages from getting under it (34a-35a, 54a-55a). However, none of the witnesses in the case had ever seen one of these contrivances (31b, 32b, 41b, 59b) and Freight Agent Clowes, an expert of twenty-eight years' experience in the freight handling business (52b-53b) who studies all new developments in the industry (53b), had never seen one on the Pennsylvania or any other railroad, or anywhere else in the freight handling equipment industry (59b).

Petitioner's counsel argued all of his theories of negligence in his summation to the jury (73b-81b).[5] In a lengthy

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4. The deposition was taken on July 13, 1955, a year and five months after the accident, and he did not tell either the examiner or his own counsel that he was in pain at the time of his deposition (21b, 22b).

5. In his opening petitioner had laid his case on three grounds: that the space between car and platform was "unusually" wide; that the Chore Boy seat should have been equipped with a guard; and that the transfer plate was too narrow (2b-4b). Petitioner did not even mention then Levy's alleged negligence which he now claims was his "major and basic theory" of liability (Petition, pp. 8, 9). That

and careful charge the trial judge submitted all of petitioner's claims to the jury, including the issue of the alleged negligence of his fellow-employees (128a-135a).

The jury returned a verdict in favor of respondent.

Petitioner's motion for a new trial was denied by the trial court, and he appealed to the court below on the sole ground that the trial judge had erroneously refused two of his points for charge concerning the negligence of a fellow employee. The Court of Appeals for the Third Circuit (Judges Goodrich, McLaughlin and Staley) in a per curiam opinion held that the requests as stated were properly denied and "the true issues in the case were fully, carefully and fairly given the jury by the trial judge."

The only basis for this petition is petitioner's claim that by refusing his two points for charge the trial court failed to submit to the jury the question of the negligence of petitioner's fellow employees.

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motion appeared for the first time in his summation at the end of the case, and even then he argued that the seat guards were the "heart of the case." (76b).

ARGUMENT.

I. The Petition Raises No Question Which Warrants Review By This Court.

This case does not justify the grant of a writ of certiorari, *Supreme Court Rule 19(b)*. This is just a case in which a plaintiff, whose self-contradictory testimony was obvious, failed to convince the jury that he was entitled to recover damages for the personal injuries which he sustained through no fault of his employer.

Petitioner has attempted to invent a question for this court by arguing that the trial court "rule[d] as a matter of law that the negligent act of a fellow employee did not contribute in whole or in part to petitioner's injuries" (Petition, p. 8). Nothing could be further from the facts. Far from restricting the jury's consideration of the railroad's alleged negligence in any respect, the charge of the court repeatedly emphasized that any negligence of petitioner's fellow employees which contributed in whole or in part to the happening of the accident would support a recovery by petitioner.

It is not the function of this court on certiorari to parse out jury instructions and test their completeness against the recorded testimony; but the court below, which did just that, was satisfied that they "fully, carefully and fairly" presented the issues to the jury. No fair-minded person could disagree. For in six separate passages, strategically placed in the charge on liability, the trial court emphasized that any negligence of a fellow employee would support a recovery for petitioner if that negligence was a factor in causing or contributing to cause the accident in whole or in part. [These portions of the charge are printed below at pp. 16-17 as an Appendix to Respondent's Brief in Opposition to Petition For a Writ of Certiorari.]

With an extended review of this court's FELA decisions (Petition, pp. 13-22), the petition belabors what it calls an "erroneous rule of causation" (Petition, p. 11), purportedly found in the court's colloquy with counsel in chambers on the various requests for instructions.[6] But the validity of these decisions was neither involved nor questioned in the rulings of the trial court or the court below. For the fact is that petitioner himself concedes that this so-called "erroneous rule of causation" was *not* involved in the trial court's charge to the jury (Petition, p. 11, Footnote 1).

Petitioner simply refuses to recognize the well established principles that in testing the propriety of a charge it must be read as a whole, *Jones Truck Lines v. Argo*, 237 F. 2d 649, 653 (8th Cir. 1956); *Southern Railway Company v. Jones*, 228 F. 2d 203, 211 (6th Cir. 1955); *Employer's Liability Assurance Corporation v. Freeman*, 229 F. 2d 547, 550 (10th Cir. 1955); and that it is not reversible error to decline a request for charge if the issues have been fairly covered in the general instructions (*David Bilgore & Co. v. Ryder*, 211 F. 2d 855 (5th Cir. 1954); *Loudermilk v. Fidelity & Casualty Co.*, 207 F. 2d 881 (5th Cir. 1953); *Thiringer v. Barlow*, 205 F. 2d 476 (10th Cir. 1953); *Southern Pacific Co. v. Souza*, 179 F. 2d 691 (9th Cir. 1950)).

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6. Petitioner quotes in his brief part of the discussion of the alleged negligence of Levy which occurred in chambers and suggests that "the trial judge conceded that Levy was negligent, but ruled as a matter of law that such negligence was not *'the proximate cause'* of the accident" (Petition p. 10-12). The fact is that the trial judge neither conceded that Levy was negligent (104a) nor removed that issue from the consideration of the jury. The general charge fully covered any negligence of any fellow employee, and counsel for petitioner was in no way restricted in his summation in urging this as a ground for recovery (73b-74b). Cf. *Stevenson v. Hearst Consol. Publications, Inc.*, 214 F. 2d 902, 910 ¶ 16 (2d Cir. 1954), *cert. den.* 348 U. S. 874 (1954).

A. Petitioner's Points for Charge Were Unsupported by the Evidence and Defective; the Trial Court Properly Exercised Its Discretion in Refusing Them.

Petitioner stresses as a "fundamental" proposition that a party is entitled to a specific instruction on his theory of the case (Petition, p. 9). But he overlooks the fact that the obligation rests upon him, not the court, to prepare points for charge on his theories of the case which are free of error and may be given without qualification or liability to be misunderstood.[7]

1. The Points Were Unsupported by the Evidence.

Petitioner argues that these points for charge[8] should have been given to the jury because, "It is clear that the accident occurred *when and only because the petitioner was forced to remove this package* which should not have been thrown under the seat of the Chore Boy where it interfered with the operation of the brake" (Emphasis supplied) (Petition, p. 10). This is simply not so. Petitioner admitted that it was a regular part of his job to assist with

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7. *Chicago and N. W. Ry. Co. v. Green*, 164 F. 2d 55 (8th Cir. 1947), on which petitioner principally relies, acknowledges this limitation. The passage which is quoted in petitioner's brief points out that a party is entitled to an instruction on his theory of the case only "if there is evidence to support it and if a proper request for such an instruction is made" (Petition, p. 9).

8. "13. I instruct you that the plaintiff, Leon Brinkley, did not assume the risk in this case that a fellow employee would, if you so find, carelessly throw a package onto the Chore Boy in such manner that it would land under the seat and interfere with its safe operation. Mr. Brinkley had the right to expect that packages would be properly loaded on the Chore Boy without subjecting him to an unreasonable risk of harm."

"18. I instruct you that your verdict would be for the plaintiff if you find that a fellow employee negligently or carelessly placed a package upon the Chore Boy which in any way, directly or indirectly, to the slightest degree, was a factor in or did contribute to the accident which produced the injuries sustained by this plaintiff. If you so find, your verdict must be for the plaintiff." (151a, 152a-153a)

loading and unloading the packages (19a, 27a, 8b). The presence of one of these packages under the seat in no way "forced" him to remove it, or "to assume a precarious position which subjected him to the hazard of falling" (Petition, pp. 9, 10), because the presence of the other packages on the truck equally obliged him to stand on the transfer plate and assist in arranging them. This was his regular job.

Even if one accepts at face value petitioner's "courtroom version" of the accident—which the jury might well have rejected in view of his testimony on deposition—the placement of the package under the seat had nothing to do with the accident. Under his own testimony it was the *unexpected weight* of it, not the *position* where the package happened to land, which caused him to lose his balance. This is quite clear from Brinkley's testimony on cross-examination. He said:

> "A. And when I went to place the package, *it was heavier than I expected*, and all of a sudden I lost my balance and went back." (16b)
>
> * * *
>
> "Q. You reached over to get hold of that package, and then *it was an unusual weight*, and you just lost your balance and fell backward, is that what happened?"
> "A. Yes, sir." (16b)
>
> * * *
>
> "A. I know that I reached to place a carton and when I grabbed hold of the carton *it was exceptionally heavy*, and I went to straighten up. I lost my balance and went into space" (21b). (Emphasis supplied.)

Thus, even on Brinkley's "courtroom version" of the accident, the location of the package had nothing to do with his loss of balance.

In the version of the accident that he gave in his deposition two years before the trial, the location of the package under the seat had nothing to do with the accident, either. He was confronted on cross-examination with statements in his deposition in which he said that he stepped up on the Chore Boy from the transfer plate in order to move the cartons about, and in stepping backward from the truck, he just stepped off into space (17b-21b). This was a direct contradiction of his courtroom story that he was actually standing on the transfer plate and reaching over the truck to move the package when he lost his balance. For example, he testified in his deposition:

> "*I stepped up on the car* to remove the carton and place that, and placing the rest of them—they were coming so fast I was trying to place them, *I stepped back and went off into space.*" (Emphasis supplied.) (19b)

The so-called negligent placing of the package under the Chore Boy seat obviously had nothing to do with Brinkley's stepping back off into space from the truck, as he testified in his deposition.

In light of these conflicting versions of the accident, and since it appeared that the unexpected weight of the package rather than the place where it was lying on the truck was what affected Brinkley's balance, the trial judge was entirely justified in covering the question of the alleged negligence in the placement of the package by a general charge on fellow employees' negligence, rather than by using the points for charge which petitioner submitted—even if they had been properly phrased.

2. The Points Were Defectively Phrased and Misleading.

Point 13 actually presumed the conclusion which it asked the jury to draw. It asserted as a risk which the petitioner did not assume, the fact "that a fellow employee

would, if you so find, carelessly throw a package on the Chore Boy in such manner that it would land under the seat and interfere with its safe operation" (151a). In this point the jury was directed that this *was* a careless act, the very issue which the jury alone could determine. The insertion of the qualifying phrase "if you so find" was obviously inadequate to prevent the jury from interpreting the point as a plain direction that the placement of the package was negligent. The last sentence in the point not only presumed that the loading of the packages subjected Brinkley to an unreasonable risk of harm, but asserted that it was someone else's job to load the truck, not Brinkley's. Under the evidence, since it was admittedly a part of his regular duties to assist in unloading the packages, he also shared the responsibility for loading and arranging them, and had no right to stand by while someone else did the job for him, as the point implied.

Point 18 was defective in several important respects. It stated as a bare conclusion that "a fellow employee negligently or carelessly placed a package upon the Chore Boy" (152a), without affording a proper standard by which that negligence might be judged, and without particularizing the facts which the jury should consider as bearing upon the determination of whether the act was negligent at all. The jury was obviously entitled to consider, and should have been so instructed, that it was a part of the petitioner's own duties to arrange the packages in assisting with the unloading; that the petitioner did not ask his fellow employee to remove the package (47a); and that it was its unexpected weight rather than the place where it landed which caused him to lose his balance.

The major vice in the point was its extravagant statement of the rule of causation that the jury should apply: " . . . which in any way, directly or indirectly, to the slightest degree, was a factor in or did contribute to the accident." (152a-153a.) As the trial judge said in discussing a similar clause, this was "adding gloss to the

facts" (100a), which could only serve to confuse the jury. The meaning of the phrase "directly or indirectly" is at best obscure and at worst, misleading, especially when it is coupled with the phrase "to the slightest degree."

Petitioner purported to find authority for a charge like this in the language of this court in *Rogers v. Missouri Pacific R. R. Co.*, 352 U. S. 500 (1957) (100a). But, as the trial judge pointed out, this court was there concerned only with the sufficiency of the evidence to uphold a verdict and the *judicial* standard that should be applied in weighing the evidence (100a). The *Rogers* case, as Mr. Justice Brennan made clear, was concerned only with "judicial appraisal of the proofs to determine whether a jury question is presented . . ." *Id.* at 352 U. S. 506-507. It had nothing to do with instructions to the jury on causation. Neither *Rogers* nor any other case has ever suggested that a plaintiff is entitled to a jury instruction with the embellishments of petitioner's point 18 here, stating that a verdict must be returned for him if there is any negligence "which in any way, directly or indirectly, to the slightest degree, was a factor in or did contribute to the accident."

Since the two points in question were defectively phrased and misleading, and the state of the evidence did not justify submitting them, the trial judge properly exercised his discretion in charging the jury on the negligence of petitioner's fellow employees in the general language that he chose, rather than in the form of petitioner's two requests.

B. All of Petitioner's Theories of Liability Were Submitted to the Jury and It Was Justified in Rejecting Them.

The evidence amply supported the jury's rejection of petitioner's claims of negligence on the part of the railroad company[9]:

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9. It is fair to observe that the jury might well have disbelieved Brinkley's courtroom story of the accident entirely and believed the version that he told in his deposition two years earlier, but attempted

First, the space between the platform and the cars was a condition that was quite familiar to petitioner and fully appreciated by him (14b). More important, it was a "safety feature" specially incorporated into new freight stations on the Pennsylvania and other railroads, intended to provide adequate clearance for the safety of car inspectors and other employees who had to work below the platform at the track level in inspecting and oiling the running gear of the cars (55b, 56b, 48b). The jury quite properly decided that a railroad company should not be charged with lack of reasonable care as to one employee, if in designing a new station, it took into consideration and made provision for the safety of other employees who were also obliged to work around the cars.

Second, the seat guard was obviously a courtroom afterthought. Such a device had never been used or even heard of on the Pennsylvania Railroad or on any other railroad system; in fact, it was unknown in the entire freight handling equipment industry, according to the testimony of Freight Agent Clowes, an expert of twenty-eight years' experience, who attends all the freight handling equipment shows and keeps abreast of new developments in the field (59b, 52b, 53b). The jury properly decided that the failure to supply an unknown, untried contrivance, which none of the experts in the industry had ever thought necessary for the safety of the men who used these trucks, could not support a charge of failure to exercise reasonable care.

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to repudiate in court (17b-21b). Brinkley was thoroughly familiar with the space between the boxcar and the platform and knew it was there when he drove on the plate (14b). The jury might reasonably have decided that the accident happened because after the plaintiff got up on the Chore Boy to adjust the packages, he simply forgot where he was, and, as he testified in his deposition, just "stepped back and went off into space" (19b, 20b, 21b). It was a simple case of an accident happening to a man in a momentary lapse of care, through no fault at all of his employer, cf. *Gill v. Pennsylvania R. R. Co.*, 201 F. 2d 718 (3rd Cir. 1953), *cert. den.*, 346 U. S. 816 (1953).

Third, the standard size wooden transfer plates which were in use at Butler Street at the time of the accident were not forty-eight inches wide but fifty-four inches wide (57b). The steel Fab-Weld plates which Brinkley and Kirby believed should have been used at the time were only one inch wider (39b). Moreover, the raised steel edge of the Fab-Weld plates (Petitioner's Exhibit 2, 155a) was designed to keep truck wheels from running over the side, not to keep employees from slipping off (40b, 57b, 58b). It was apparent to any reasonable juror that a raised edge on such a plate would be a tripping hazard rather than a safety feature for a man walking on it. The jury properly decided that the wooden plate was adequate and that the failure to use a Fab-Weld plate instead of the plate that was used at the time of the accident was not negligence.[10]

Finally, the so-called negligence of Levy in putting the package on the truck was neither negligent nor a causal factor in producing the accident, and the jury was justified in so concluding. All that Levy's testimony amounted to was a statement that he did not tell Brinkley that the package had gone under the seat (46a), a fact which petitioner himself knew without being told. Although Levy might have moved the package (46a), Brinkley never asked him to do it (47a) because it was part of Brinkley's own job to assist with the unloading (19a, 27a, 8b). In his "deposition version" of the accident, he fell after he had arranged the packages when he stepped backward off the truck into space (19b, 20b, 21b). But even under petition-

10. The jury might also have reasonably concluded that instead of parking the Chore Boy on the transfer plate as Brinkley did, he should have left it on the station platform until a space had been cleared out within the car large enough to provide room for it inside, as he testified it was their practice to do "whenever possible" if freight was being unloaded by hand (27b, 28b). The doubtful explanation that he and Kirby gave for his failure to follow this safer procedure, that Freight Agent Clowes had cursed at the crew and was hurrying them along that morning, was contradicted not only by General Foreman Whittaker and Freight Agent Clowes himself, but also by the fourth member of the gang, Tedeschi (32b, 42b, 60b).

er's "courtroom version" of the accident, it was not the location of the package under the seat, but its unexpected weight that caused him to lose his balance (27a, 16b, 21b). Thus, the jury properly concluded that nothing that Levy did was negligent or had anything to do with the accident.

All of these theories were submitted to the jury. Its verdict for respondent was supported by the overwhelming weight of the evidence. It should not be set aside because the trial judge refused two points for charge which were amply covered in the instructions that were given and were defective and unjustified by the evidence.

CONCLUSION.

This case involves no important question of law or conflict with the decisions of this court. Its routine question, whether the trial court's refusal of two of petitioner's points for charge was proper under the evidence, was fully considered by an able Court of Appeals and resolved against petitioner. That court, upon reviewing the record, concluded that the requests were properly denied and that the issues in the case were "fully, carefully and fairly given the jury by the trial judge." Its judgment need not and should not be reviewed by this court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
ROBERT M. LANDIS,
Counsel for Respondent.

September, 1958.

APPENDIX.

Excerpts From the Charge to the Jury.

Now, the Federal Employers Liability Act provides that every common carrier by railroad, such as *the defendant in this case, shall be liable in damages to any person* suffering any injury while he is employed by such carrier in interstate commerce, *for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of the railroad.* (Emphasis supplied.) (128a-129a).

* * * *

Here *there must be the element of negligence on the part of some officer, agent or employee of the carrier,* other than the plaintiff, and *that negligence must be a factor in causing or contributing to cause the injury* before there can be any verdict in favor of the plaintiff. (Emphasis supplied.) (129a)

* * * *

The first question you have to confront you in this case is *was the defendant, Pennsylvania Railroad Company, its employees or agents, negligent.* That includes its officers, who, of course, are employees. The second question is *did this negligence,* if any, proximately—that is, as a logical consequence—*contribute in whole or in part to cause the injuries* complained of by the plaintiff. (Emphasis supplied.) (129a-130a)

* * * *

Did *the (602) railroad company, its officers, agents and employees, or any of them,* do anything which a reasonable man properly considerate of the safety of others would not do, or *did they, or any of them,* fail to do what such a

reasonable man would do? *If they did not act in a manner properly considerate of the safety of others* under all of the circumstances measured by the test of what a reasonable man would do, *then that is negligence.* (Emphasis supplied.) (130a)

• • •

The plaintiff—that is Mr. Brinkley here— has the burden of proving to you by a greater weight or a fair preponderance of the evidence that *the defendant, its officers, (603) agents or employees* other than himself *were negligent in failing to use reasonable care to provide the plaintiff with a reasonably safe place to work.* (Emphasis supplied.) (131a)

• • •

An employee does not, by obeying orders of his superior and working, *assume any of the risks of the harm that may befall him by reasons of negligence, if any, of his employer or his fellow employees.* (Emphasis supplied.) (135a)